Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

(3)

No. 90-1802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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July 22, 1991

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Petitioners Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company (collectively, "Nationwide")[1] hereby submit their Reply to the Brief of Opposition to the Petition for Writ of Certiorari filed by Robert T. Darden ("Darden"). In accordance with Rule 15.6 of this Court's Rules, this brief is limited to arguments first raised in the Brief in Opposition.

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[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners was included at page (ii) of the Petition. No amendments are required to make such listing currently accurate.

The Brief in Opposition does not deny that the standard for determining "employee" status under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is both an important question of federal law and the subject of conflict among the courts of appeals. Darden's only cognizable objection to Nationwide's Petition [2] is that the conflict among the lower courts existed at the time this Court denied the petition for certiorari in *Plazzo v. Nationwide Insurance Co.*, No. 88-4016 slip op. (6th Cir., Dec. 22, 1989), *cert. denied*, No. 89-1499 (Oct. 29, 1990). Because the Fourth Circuit's *Darden II* decision [3] was pending at the time the Court considered the petition in *Plazzo*, it was then uncertain whether the Fourth Circuit would apply its *Darden I* standard [4] in a manner conflicting in result with the common-law agency principles applied under ERISA in the Fifth, Sixth and D.C. Circuits, discussed in the Petition. *Darden II* confirms that there is a conflict on this fundamental ERISA issue ripe for the Court's review.

As discussed in the Petition, the *Darden* standard also conflicts with the United States government's interpretation of ERISA. The Brief in Opposition reads the *amicus* brief of the United States filed with respect to the petition for certiorari in *Plazzo* as arguing that "courts utilizing the common law approach may be applying an unduly restrictive approach and ignoring this Court's decision

[2] The majority of the Brief in Opposition is directed to an argument on the merits of the question presented by the Petition. The only contention that requires a response at this time is the suggestion that Darden was not acting as an independent contractor for Nationwide under traditional agency priciples. Brief in Opposition at 11-12. As discussed in Nationwide's Petition at 5, the district court found that Darden was *not* Nationwide's employee at common law and the Fourth Circuit supported that conclusion in *dicta*.

[3] 922 F.2d 203 (4th Cir. 1991).

[4] 796 F.2d 701 (4th Cir. 1986).

involving remedial social legislation . . . ." Brief in Opposition at 16. Darden plainly misstates the thrust of the government's position. The *amicus* brief clearly states at 11-12 that "employee" status under ERISA should be determined under common-law factors, taking into account those factors as a whole so as to avoid an overly technical approach that would frustrate Congress's remedial goals in enacting ERISA.

The government's position is confirmed by Department of Labor Advisory Opinion 91-17A (reprinted as an appendix to this brief), which became available subsequent to the filing of Nationwide's Petition. The Department of Labor, the agency responsible for the administration of ERISA, described the proper determination of ERISA "employee" status as follows:

> The term "employee" is defined in ERISA section 3(6) to mean "any individual *employed* by an employer." (Emphasis added). An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For purposes of ERISA section 3(6), whether an employer-employee relationship exists will be determined by applying common law principles, taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also to the details and means by which the result is to be accomplished, whether the person for whom services are being performed has the right to discharge the individual performing the services, whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services, *etc.*

The *Darden* standard thus conflicts in both form and result with the "employee" standard adopted by the

United States and three other courts of appeals. This important federal question merits review by this Court.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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July 22, 1991

APPENDIX

APPENDIX

[SEAL]

[Apr. 5, 1991]

91-17A

Mr. L. J. Darter, III
Office of Commissioner of Insurance
Seventh Floor, West Tower
Floyd Building
2 Martin Luther King, Jr., Drive
Atlanta, Georgia 30334

Dear Mr. Darter:

This is in response to your request for an advisory opinion regarding the status of the health benefit program sponsored by the Synesys Service Corporation (Synesys) under title I of the Employee Retirement Income Security Act (ERISA). Specifically, you have requested an opinion as to whether the Synesys health plan is a multiple employer welfare arrangement (MEWA) within the meaning of ERISA section 3(40) and, therefore, subject to applicable state insurance regulation.

According to your letter, Synesys represents that it is engaged in the business of "employee leasing." Client employers sign service agreements with Synesys, under which Synesys provides certain services in connection with employees. Synesys maintains that the employees are actually employees of Synesys, and are merely "leased" to the client. With respect to the Synesys health plan, Synesys maintains that the plan is a single employer plan under ERISA and, as such, is exempt from state regulation. Accompanying your request was a copy of Synesys' 11/89 Client Service Agreement (the "11/89 Agreement"), which, according to your letter, appears to be the Agreement under which all existing clients are contracted.

Also accompanying your request was a copy of a revised Client Service Agreement dated 6/90 (the "6/90 Agree-

ment") with respect to which you have inquired whether the Department's views would be any different if that Agreement were put into effect.

Pursuant to Section 1(a) of the 11/89 Agreement, Synesys agrees to furnish the client certain "staff management services" relating to specified job function positions. Employees filling such job function positions are referred to as "covered employees." Pursuant to Section 1(b), the client agrees to adopt employee benefit plans sponsored by Synesys. Section 7(a) of the 11/89 Agreement provides, in relevant part, that "Synesys shall be exclusively responsible for administrative employment matters such as payment for all covered employees' wages, payment of all federal, state and local employment taxes, providing workers' compensation coverage, obtaining group health insurance, and administering pension plan coverage as well as other non-obligatory fringe benefit programs for covered employees." Section 7(b) provides that the "[c]lient shall have the sole responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining and firing of individuals assigned to fill Client's job function positions; however, Synesys shall handle all administrative matters relating to these functions." Section 7(c) provides, in relevant part, that "[i]t is understood and agreed that Client shall be the employer of all covered employees and shall retain all rights and obligations arising by statute or common law and pertaining solely to the employment relation." Section 7(c) also provides that, notwithstanding the foregoing, the parties understand that various statutory provisions, such as Section 3401(d) of the Internal Revenue Code may define Synesys as an "employer" for certain narrow purposes.

The term "multiple employer welfare arrangement" is defined in ERISA section 3(40)(A) to mean:

> . . . an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—
>
> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
>
> (ii) by a rural electric cooperative.

Inasmuch as there is no indication that the Synesys health plan is established or maintained under or pursuant to one or more collective bargaining agreements or by a rural electric cooperative, the only issue relating to the plan's status as a MEWA appears to be whether the Program provides health benefits "to the employees of two or more employers." The resolution of this issue is dependent on whether, for purposes of ERISA section 3(40), the employees covered by the Synesys health plan are employees of a single employer (i.e., Synesys) or more than one employer (i.e., Synesys' Clients).

Section 3(5) of ERISA defines the term "employer" to mean:

> any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

As reflected above, the term "employer", for purposes of title I of ERISA, encompasses not only persons with respect to which there exists an employer-employee relationship between the employer and individuals covered by a plan (i.e., persons acting directly as an employer), but

also certain persons, groups and associations, which, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with the individuals covered under an employee benefit plan. Therefore, it does not necessarily follow that, merely because a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5), the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.

The term "employee" is defined in ERISA section 3(6) to mean "any individual *employed* by an employer." (Emphasis added). An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For purposes of ERISA section 3(6), whether an employer-employee relationship exists will be determined by applying common law principles, taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also to the details and means by which the result is to be accomplished, whether the person for whom services are being performed has the right to discharge the individual performing the services, whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services, *etc.*

On the basis of Synesys' 11/89 Client Service Agreement, there is no indication that Synesys maintained, or ever intended to maintain, an employer-employee relationship with individuals participating in the Synesys health plan as "covered employees" pursuant to the 11/89 Agreement (*See*: section 7(b)). In fact, Synesys specifically provided in its Agreement that the client, rather than Synesys, shall be the employer of all covered employees and retain all rights and obligations arising with respect thereto. Accordingly, it is the view of the Department that the individuals participating as "covered employees" under the 11/89 Agreement in the Synesys health plan would be "employees" of the client employers.*

Therefore, unless the client employers whose employees are covered under the Synesys health plan constitute a "control group" within the meaning of section 3(40)(B) of ERISA, it is the view of the Department that, with respect to individuals participating as "covered employees" under the 11/89 Client Service Agreement, the Snyesys health plan would be an arrangement providing benefits to the employees of two or more employers and, therefore, a multiple employer welfare arrangement within the meaning of ERISA section 3(40)(A). Accordingly, the preemption provisions of ERISA would not preclude state regulation of the Synesys health plan to the extent provided in ERISA section 514(b)(6)(A). In this regard, we are enclosing, for your information, a copy of advisory opinion No. 90-18A (dated July 2, 1990) which discusses the scope of the states' authority to regulate MEWAs pursuant to section 514(b)(6)(A) of ERISA.

Pursuant to your request, we have also reviewed the Client Service Agreement dated 6/90. Similar to the 11/89 Agreement, the 6/90 Agreement vests in the client the sole right and responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining, directing, controlling and firing individuals assigned to fill client's job function positions (Section 9(e)). While,

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* Although we conclude in this situation that the individuals participating as "covered employees" in the Synesys health plan under the 11/89 Agreement are "employees" of the client employers, the Department notes that Synesys may also be considered an "employer" within the meaning of section 3(5) of ERISA.

unlike the 11/89 Agreement, the 6/90 Agreement does not specifically indicate that the client shall be the employer, the absence of such an indication would not be significant where the client in fact maintains the employer-employee relationship with the "covered employees." Under the terms of the 6/90 Agreement, inasmuch as the client, rather than Synesys, would appear to be maintaining the employer-employee relationship with the "covered employees", the Department would, in the absence of facts to the contrary, reach the same conclusion as indicated above with respect to the 11/89 Agreement.

In conclusion, it should be noted that, while the foregoing views are based on the terms of the Agreements accompanying your request, a contractual arrangement will not be determinative of an employer-employee relationship when the facts and circumstances of the situation contradict the terms of the contract.

The preceding constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this opinion is issued subject to the provisions of that Procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

Enclosure